



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2011-0227  
**Issued at:** Ottawa, May 9, 2012

**DARREN COSTAIN**

Complainant

AND

**THE CHAIRPERSON OF THE CANADIAN RADIO-TELEVISION AND  
TELECOMMUNICATIONS COMMISSION**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaint is dismissed
<b>Decision rendered by</b>	Lyette Babin-MacKay, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Costain v. Chairperson of the Canadian Radio-television and Telecommunications Commission</i>
<b>Neutral Citation</b>	2012 PSST 0011

## Reasons for Decision

### Introduction

1 The complainant, Darren Costain, alleges that the respondent, the Chairperson of the Canadian Radio-Television and Telecommunications Commission (CRTC) abused its authority in the advertised appointment process held to staff the position of Departmental Security Officer (DSO), at the AS-06 group and level. More specifically, he alleges that the appointee, Jeff Woodruff, does not have the essential experience required for this position and that he was improperly screened in. He further alleges that the respondent changed the essential experience requirements after the position was advertised, and did not assess all the knowledge qualifications.

2 The respondent denies all allegations. It responds that it was satisfied that the appointee had the required experience. It also asserts that it did not modify any of the essential qualifications, which were fully assessed.

3 The Public Service Commission (PSC) did not appear at the hearing but presented a written submission in which it reviewed the concept of abuse of authority and described relevant PSC policies and guidelines concerning advertisement, assessment, notification and selection. It did not take a position on the merits of the case.

4 For the reasons that follow, the Public Service Staffing Tribunal (the Tribunal) finds that the complainant has not demonstrated that the respondent abused its authority in the assessment of the experience qualifications, or that it failed to assess all essential qualifications.

### Background

5 The respondent advertised this appointment process on *Publiservice* on February 8, 2011. A “very important notice” on the *Job Opportunity Advertisement* (JOA) instructed candidates as follows:

Candidates must use the experience factor as a header and then write one or two paragraphs demonstrating how they meet the experience required. Resumes may be used as a secondary source to validate the experience described in the cover letter. Failure to provide this information may result in your application being rejected.

**6** The JOA and the *Statement of Merit Criteria* (SMC) listed four essential “recent” and “significant” experience qualifications:

Recent and significant experience developing, implementing and managing policies and operational procedures related to a Departmental Security program. (E-1)

Recent and significant experience conducting administrative investigations in accordance with TBS guidelines. (E-2)

Recent and significant experience preparing and presenting reports to senior management on issues related to a Departmental security program. (E-3)

Recent and significant experience in emergency preparedness and business continuity planning. (E-4)

**7** In both documents, “recent” and “significant” experience were defined as follows:

Recent experience is defined as experience within the last three (3) years.

Significant experience is defined as experience that was a core part of the candidate’s employment for a period of at least five (5) [years].

**8** The SMC listed three knowledge, six ability and six personal suitability qualifications.

**9** Of the 24 persons who applied, seven were screened in, on the basis of education and experience; two candidates subsequently withdrew from the process. The five remaining candidates were assessed by means of a written test, an interview and a verification of references.

**10** The two-member assessment board was comprised of Jennifer Wilson, Director General – Human Resources and delegated manager for the process, and also of the DSO of the Department of Canadian Heritage.

## **Issue**

**11** The Tribunal must determine whether the respondent abused its authority when it assessed the experience and knowledge qualifications.

## Analysis

**12** Abuse of authority is not defined in the *Public Service Employment Act* (the PSEA), but s. 2(4) states: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

**13** As the Tribunal's jurisprudence has established, the complainant has the burden to prove, on a balance of probabilities, that there was an abuse of authority in the appointment process (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 and *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007)

**14** The complainant argues that the appointee did not follow the instructions in the JOA and demonstrate how he met the recent and significant experience requirements.

**15** On the SMC attached to the candidates' invitation to the written test and interview (the invitation), recent and significant experience was defined differently than on the original SMC, as "*experience that was a core part of the candidate's employment for a period of at least five (5) years within the last 3 years*". This SMC listed five (not three) knowledge and seven (not six) ability qualifications.

**16** Alain-Denis Bastien, Chief of Human Resources Operations and Labour Relations, and Chief of Staffing, explained that because of a clerical error, a draft of the SMC was inadvertently attached to the invitation and, later, to the *Notification of Consideration* (NOC). This draft SMC contained an earlier version of the experience qualification, namely "*experience that was a core part of the candidate's employment for a period of at least five (5) years within the last 3 years*". It also listed two additional knowledge qualifications and one additional ability qualification. Mr. Bastien testified that these particular qualifications were never assessed and that the SMC attached to the JOA was the only one used at all steps of the appointment process. Ms. Wilson confirmed Mr. Bastien's testimony.

**17** By the end of the assessment process, three candidates had been found qualified, including the complainant and Mr. Woodruff.

**18** On April 1, 2011, a NOC was issued, naming Mr. Woodruff for the position of DSO. That same day, in an email to the respondent, the complainant raised concerns that an error may have been made in screening in Mr. Woodruff and that he had personal knowledge that this candidate did not meet the essential experience qualifications.

**19** Following verification, Ms. Wilson and André Chartrand, then DSO at the CRTC, confirmed that Mr. Woodruff had the required experience. They recorded their conclusions on the *Post-Complaint Report on Screening of Experience* (the *Post-Complaint Report*), which they signed.

**20** On April 11, 2011, a *Notification of Appointment or Proposal of Appointment* was posted for Mr. Woodruff's indeterminate appointment to this position.

**21** That same day, the complainant filed a complaint of abuse of authority pursuant to s. 77(1)(a) of the PSEA.

**22** In his testimony, the complainant reviewed Mr. Woodruff's cover letter and résumé at length, and commented on the findings recorded in the *Post-Complaint Report*, which he called inappropriate and inaccurate.

**23** In particular, he stated that the appointee had not been Departmental Security Officer/Manager, Occupational Health, Safety and Security at the Natural Sciences and Engineering Research Council (NSERC) from August 2008 to the present, as he indicated in his résumé. In fact, he had held other positions during that period including the position of Training and Awareness Officer at NSERC, from July 2009 to May 2010.

**24** The complainant also stated that in the *Post-Complaint Report*, the board incorrectly indicated that Mr. Woodruff had worked at the Department of Fisheries and Oceans (DFO) from January 2008 to July 2009. This was not possible, because he had hired the appointee at the PSC in July 2008 from outside the public service and

was his immediate supervisor until November 2008. He had personal knowledge that Mr. Woodruff's experience was not as Mr. Woodruff had stated.

**25** The complainant added that in his cover letter and résumé, Mr. Woodruff did not indicate that he had experience E-1. Mr. Woodruff had managed "procedures and guidelines", not "policies", and had not stated that he "developed policies" With regard to experience E-2, he had not indicated that he had conducted administrative investigations in accordance with Treasury Board Secretariat (TBS) guidelines. Mr. Woodruff had conducted audit projects, but audit and security were different fields and the respondent had broadened the definition of experience by including audits. Mr. Woodruff had not indicated that he had experience E-3. The board had incorrectly concluded that being responsible to the Vice-President of Administration Services and to the Senior Management Committee of NSERC meant that Mr. Woodruff had prepared and presented reports to senior management on issues related to a departmental security program. Similarly, for Health Canada (HC), Mr. Woodruff had not stated that he had experience reporting to senior management in relation to a departmental security program. Finally, making recommendations regarding security to senior management at DFO did not mean that Mr. Woodruff had prepared and presented the reports. As to the appointee's experience as Canadian Forces Special Operations/Counter Terrorism Police Support Staff, his statement that he had conducted risk-based planning for operational missions using various intelligence reports did not mean that he had made reports to senior management. Staff in that organization did not all write policies and procedures and did not all report to senior management.

**26** According to the complainant, taking all facts into consideration, the board had incorrectly assumed that Mr. Woodruff had the required experience because of the positions he had held.

**27** In her testimony, Ms. Wilson described the essential experience qualifications, and explained the definitions of "recent" and "significant" experience. The required experience had to be **recent**, that is, it had to have been acquired in the last

three years. It also had to be **significant**, that is, it had to have been a core part of a person's experience for at least five years.

**28** The screening was carried out by a Human Resources Officer, who consulted Ms. Wilson about the pertinence of Mr. Woodruff's military experience. Based on Mr. Chartrand's advice that Mr. Woodruff's military police background was relevant to security, Ms. Wilson screened him in.

**29** She explained that when she received the complainant's concerns about the screening, she ordered that the experience of screened-in candidates be reviewed. She also contacted Mr. Woodruff herself to inform him of the allegations raised, and she later met with him. Mr. Woodruff provided her with additional information and with the names of two persons who could confirm he had the required experience. She also contacted another person at the Department of National Defence (DND), to whom she was referred through Mr. Woodruff and his DND reference. Finally, she contacted Mr. Woodruff's supervisor at NSERC, where Mr. Woodruff was then a DSO.

**30** As a result of this review, Ms. Wilson concluded that she had appropriately screened in Mr. Woodruff.

**31** In her testimony, Ms. Wilson referred to statements in Mr. Woodruff's cover letter and résumé that the board had considered related to experience E-1 and E-3. She agreed that Mr. Woodruff did not state that he had conducted administrative investigations in accordance with TBS guidelines (E-2) while in the military, but other statements in Mr. Woodruff's résumé led the board to conclude that it was "implicit" that he had the required experience. Ms. Wilson was satisfied that the additional information Mr. Woodruff provided later clarified this.

**32** In order to further verify the experience, Ms. Wilson contacted Mr. Chartrand, who was the former DSO, and testified that Mr. Chartrand told her that, based on his own experience, he was convinced that Mr. Woodruff had worked in security and had acquired the necessary experience.

**33** The Tribunal has examined the *Post-Complaint Report* in which the conclusions from the review were recorded. Of note, it indicates that “for screening purposes during this process, [the] **very important notice** [contained in the JOA] was not used to screen out any of the applications, as it would have reduced the pool of applicants to two (2).” It was within the board’s discretion not to strictly apply the instructions given in the JOA. This notice had merely stated that failure to provide the experience information in the required format **may** result in the application being rejected.

**34** As the Tribunal has stated in *Visca v. Deputy Minister of Justice*, 2007 PSST 0024 at para. 42, s. 30(2) of the PSEA gives managers broad discretion to establish the necessary qualifications for the position they want to staff and to choose the person who not only meets the essential qualifications, but is the right fit. Similar discretion is provided under s. 36 of the PSEA for those with staffing authority to choose and use assessment methods to determine if the person meets the established qualifications. Given this discretion, the Tribunal finds that the respondent did not abuse its authority in allowing Mr. Woodruff to be screened in. It bears highlighting, however, that this discretion is not absolute, and abuse of authority may be found if the complainant proves that the method used to assess these qualifications is unreasonable or did not assess the qualifications listed on the SMC (see *Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada*, 2008 PSST 0015).

**35** The complainant also argues that the appointment is not based on merit because the appointee does not meet the experience qualifications for the position. The respondent was careless and reckless during the assessment and it based its assessment on inadequate material and on assumptions. It acted in bad faith when it failed to correct its errors.

**36** In this case, Ms. Wilson decided that candidates required recent and significant experience in four different areas. This “recent” experience did not need to total three years. Rather, it had to have been acquired in the last three years. The experience was deemed “significant” if it had been a core part of the candidate’s employment experience for a period of at least five years.



**37** When the screening was conducted, Ms. Wilson was satisfied that the appointee met the essential experience qualifications. As a result of concerns the complainant brought to her attention, Ms. Wilson verified the appointee's stated experience. She did this by speaking to him and to his current and former supervisors. She also examined the letters of clarification provided by the appointee and by his references.

**38** Ms. Wilson was assisted in her task by Mr. Chartrand. They recorded their conclusions in the *Post-Complaint Report*, which they both signed. They confirmed their initial finding that the appointee had the required experience.

**39** It is not for the Tribunal to establish essential qualifications or to redo the assessment of a candidate's qualifications. The Tribunal's role is to determine if there was an abuse of authority in the appointment process (see *Lavigne v. Canada (Justice)* 2009 FC 684 at para. 70).

**40** The Tribunal has examined the letters of clarification that the appointee and his references provided. They make reference to writing policies, preparing and presenting reports to senior management, and conducting administrative investigations. Ms. Wilson indicated that she had also contacted the appointee's supervisor at NSERC, in addition to another manager at DND but there is no written record of this. Ms. Wilson should have clearly recorded the information provided by these persons.

**41** In the *Post-Complaint Report*, the number of months the appointee worked with various employers (NSERC, HC, DFO, and the Canadian Forces) is indicated in two columns respectively titled **Recent** and **Significant** experience. The Tribunal has found discrepancies in this compilation. Although the column titled "Recent" indicates that the appointee was employed at DFO for a period of 18 months, the evidence shows that he worked at DFO for eight months only.

**42** The complainant did not specifically question Ms. Wilson with regard to this discrepancy. However, in view of the fact that the respondent defined recent experience as experience acquired in the last three years, rather than a total of three years, the Tribunal considers that it falls within the parameters set by the respondent.

The complainant has not demonstrated that this constituted a serious error. It is an error but it doesn't rise to the level of abuse of authority.

**43** Also, for each experience qualification, a brief statement on the *Post-Complaint Report* indicates the nature of the experience and where it was acquired. With regard to the military experience, Mr. Chartrand, as the subject matter expert, indicates that based on his "own security background", or "experience", he understands that Mr. Woodruff would have performed various required functions. Mr. Chartrand did not testify and the report does not explain in more details how he reached his conclusion. The letters of clarification that the appointee and his referees provided make reference to writing policies, reading and preparing reports to senior management, and conducting administrative investigations.

**44** With regard to the appointee's military experience, the board was satisfied that it was relevant to the position. Ms. Wilson's testimony is that it had been a core part of the candidate's experience for a period of at least five years and, therefore, it met the criteria of "significant" experience qualifications.

**45** Accordingly, the Tribunal finds that the complainant has not demonstrated that the respondent abused its authority in assessing the appointee's experience.

**46** Referring to the different definition of experience shown on the SMC attached to the invitation and on the NOC, the complainant alleged that recent and significant experience meant that it needed to have been a core part of a candidate's experience for a period of at least three years during the last five years. He contends that the respondent changed the definition during the appointment process, to justify its having screened in the appointee, who did not meet this particular experience definition.

**47** In addition, he alleges that the respondent failed to assess two of the knowledge qualifications indicated on the SMC attached to the invitation.

**48** The evidence does not support these allegations. Mr. Bastien and Ms. Wilson had testified that the correct definitions of experience and correct qualifications were published in the JOA and its SMC. This is confirmed by the *Screening Board Report*

for the process that was signed on February 21, 2011. It contains definitions of experience identical to those published in the JOA and its SMC. Similarly, the *Interview Board Report* and the *Written Exam Board Report*, which record the candidates' results at the interview and at the written exam, confirm that three knowledge and six abilities qualifications were assessed during the process, not the five and seven listed in the erroneous SMC.

**49** It would have been preferable that the respondent issue an amendment or advise candidates of the error when it discovered that an incorrect SMC had been attached to the invitation. Because it contained additional knowledge and ability qualifications, it is possible that, as a result, candidates incurred additional and unnecessary preparation. However, no evidence was presented at the hearing that this had occurred.

**50** As well, an amended NOC should have been issued to correct the error concerning the definition of the experience qualification. Indeed, the objective of the *PSC Policy on Notification* is "to ensure transparency by providing the persons entitled to be notified with information about the appointment decision". This was not achieved by the publication of incorrect information. However, this error is not serious enough to amount to an abuse of authority.

**51** The Tribunal finds that the complainant has not demonstrated that the respondent changed the definition of experience or that it failed to assess all qualifications.

**52** The complainant also argues that the verification conducted by the respondent after the publication of the NOC was a new assessment, in contravention of s. 48 of the PSEA which states that notification is issued when the assessment is complete.

**53** The *PSC Guide to Implementing the Notification Policy* states:

During the waiting period, between the notification of consideration and the notification of appointment or proposed appointment, the manager could become aware of information that causes them to change their decision.

**54** It was entirely appropriate for the respondent to conduct a verification of the candidate's experience, after concerns were brought to its attention by

the complainant that may ultimately have caused it to change its decision. The verification process did not, therefore, constitute a new assessment (see *Brunet v. Commissioner of the Royal Canadian Mounted Police*, 2011 PSST 0030).

## Decision

**55** For all these reasons, the complaint is dismissed.

Lyette Babin-MacKay  
Member

## Parties of Record

<b>Tribunal File</b>	2011-0227
<b>Style of Cause</b>	<i>Darren Costain and the Chairperson of the Canadian Radio-television and Telecommunications Commission</i>
<b>Hearing</b>	January 12 and 13, 2012 Ottawa, Ontario
<b>Date of Reasons</b>	May 9, 2012
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Darren Costain
<b>For the respondent</b>	Pierre Marc Champagne
<b>For the Public Service Commission</b>	Kimberley J. Lewis (written submissions)